In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. ~~79-~~574

STATE OF OHIO,

Petitioner,

vs.

ELBERT TATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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In The

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No. ————

STATE OF OHIO,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court entered in the above entitled case on July 11, 1979, which, upon vacation and remanding by mandate, ordered for the defendant a new trial and created an inflexible rule that no implicit waiver of trial by jury can ever suffice. By its decision the Ohio Supreme Court has gone beyond the requirements of federal law and this Court's opinion in *North Carolina* v. *Butler,* — U.S. —, 60 L. Ed. 2d 286, 99 S. Ct. — (April 24, 1979).

OPINION BELOW

The Opinion of the Supreme Court of Ohio is reported at 59 Ohio St. 2d 50 (July 11, 1979), and printed herein as Appendix A. The Opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, is unreported and printed herein as Appendix B. The verdict of guilty and judgment of the Hamilton County Municipal Court is unreported and appears only in the original docket and record of that court.

JURISDICTION

The judgment of the Hamilton County Municipal Court, Criminal Division, was entered against the defendant on May 24, 1977. The Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the decision of the trial court on November 22, 1978. From a final judgment of the Supreme Court of Ohio entered in this case on July 11, 1979, reversing the conviction and ordering a new trial, the Ohio Supreme Court created an inflexible rule that no implicit waiver of trial by jury can ever suffice. The State of Ohio petitions this Court for a Writ of Certiorari, pursuant to Rule 22 (1) invoking this Court's jurisdiction under 28 U.S.C., Section 1257.

QUESTION PRESENTED

Does federal law prohibit a state trial court from finding an implied waiver of jury trial from the totality of the surrounding facts and circumstances of the case, under the Fifth and Sixth Amendment, as applicable to the States through the Fourteenth Amendment, thereby creating an inflexible rule which goes beyond the mandates of the United States Constitution, where the defendant is a man of above intelligence and represented by employed counsel,

and the latter informs the trial court that the jury was waived and when asked by the trial judge if the defendant was ready and did not mention a jury trial, proceeded to trial before the Court, and where the defendant and his counsel had no complaint about proceeding without a jury after conviction and sentencing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment IV of the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . ."

Amendment XIV, Section I of the Constitution of the United States provides:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 10, Constitution of Ohio, provides:

> ". . . In any trial, in any court, the party accused shall be allowed . . . a speedy public trial, by an impartial jury . . ."

The pertinent Ohio Rule of Criminal Procedure, Rule 23, and Ohio Revised Code, Section 2945.05, are set forth in Appendix C herein.

STATEMENT OF THE CASE

Elbert Tate was convicted upon trial without intervention of a jury in Hamilton County Municipal Court, Hamilton County, Ohio, for the offense of Complicity to commit Criminal Damaging. From a judgment imposing 30 days imprisonment, the defendant appealed to the Ohio Supreme Court. That Court reversed said conviction and ordered a new trial, finding the defendant was denied his constitutional right to trial by jury and held a waiver of trial by jury can only be effected when in writing.

The State's evidence tended to show that Elbert Tate, who was one of a group of teachers on strike, was charged with complicity to commit criminal damaging. At arraignment, the defendant entered a plea of not guilty and was assigned a trial date. Prior to the trial date, a jury demand in writing was filed by defendant's attorney. Thereafter, a second attorney was employed to aid the defense at trial. Counsel for the defense informed the trial judge that the jury trial was to be waived, and the Court changed the pre-trial date to a trial setting.[1]

The case was called on the trial court's calendar and the defense indicated to the trial court a willingness to proceed to trial and that the plea remained as one of not guilty. Then followed a preliminary motion argued by the defense and overruled by the trial court. Thereafter, witnesses were sworn and the trial without intervention of a jury commenced. At the conclusion of the presentation of the evidence, the defendant having testified in his own behalf, the trial court heard the arguments of counsel. At the conclusion of argument, the Court entered a judgment of

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[1] The sworn affidavit of the trial judge was duly certified and transmitted as a supplement to the record considered on appeal and is herein contained as Appendix E.

guilty and addressed the defendant and both defense counsel as follows:

> "Is there anything you care to say before the Court passes sentence?"

The defense counsel responded in mitigation. The trial judge addressed the defendant as follows:

> "All right. Well, you want to say anything, Mr. Tate?"
> Mr. Tate: "No sir."

The Court thereafter pronounced sentence. After sentence was pronounced, counsel for the defendant said:

> "Mr. Tate has informed me he wishes to appeal the Court's decision. May we ask for a stay of execution and allow Mr. Tate to remain on the same bond — pending appeal?"

The trial court granted the Appellant's request and the appeal was perfected.

The transcript of proceedings evidences no mention of the defendant's desire to proceed to trial before a jury and is devoid of any oral objection to a bench trial, before, during, or after trial and sentence.

Assigned as error was a claim that the defendant suffered a deprivation of his constitutional right to trial by jury where the waiver of trial by jury was not written.

The Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the decision of the trial court and found that the action of trial counsel, in the presence of defendant, taken in open court, with no objection voiced, was the act of the defendant and that a waiver of jury

trial had been effectuated and the defendant was not entitled to have the sentence vacated.[2]

The Supreme Court of Ohio reversed defendant's conviction, and ordered a new trial.[3] The Ohio Supreme Court held that there can only be a waiver of the right to trial by jury when evidenced by an express written document. The Ohio Supreme Court rejected the "totality of circumstances" and "oral waiver" theories and created an inflexible mandatory rule that an effective waiver of jury must be in writing.

THE QUESTION IS SUBSTANTIAL AND OF GREAT PUBLIC INTEREST

The question raised by Petitioner is substantial for a state court can neither add to nor subtract from the mandates of the United States Constitution. The Ohio Supreme Court erred in its interpretation of the Constitution by its decision that trial by jury may only be waived in writing. The Ohio Supreme Court held that a waiver of the right to trial by jury will not be recognized under any circumstances unless such waiver is specifically effected in writing. This holding is in direct contravention to the Federal Constitution and this Court's decision in *North Carolina* v. *Butler,* 60 L. Ed. 2d 286 (March 27, 1979).

Even when the fundamental right of trial by jury is involved, the question of waiver must be determined on "the particular facts and circumstances surrounding that

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[2] The Opinion of the First District Court of Appeals, Hamilton County, Ohio, is herein contained in Appendix B.

[3] The Opinion of the Ohio Supreme Court reported in 59 Ohio St. 2d 50 (1979) is reproduced in its entirety as Appendix A in the State of Ohio's Petition for Certiorari.

case, including the background, experience, and conduct of the accused." *State of North Carolina* v. *Butler,* 60 L. Ed. 2d 286, 99 S.Ct. —— (1979). The per se rule that the Ohio Supreme Court has stated as a mandatory prerequisite to waiver does not speak to these concerns enunciated by the United States Supreme Court in *North Carolina* v. *Butler.* The test is not whether the exercise of the waiver is express, but whether it is real, recognizing that the burden of persuasion in establishing waiver rests entirely upon the State. The Ohio Supreme Court found that the defendant was denied his constitutional right to trial by jury beacuse there was no waiver in writing. However, there is no constitutional requirement that the waiver be in writing. The Ohio Supreme Court, in interpreting that the Constitution mandates that a valid waiver cannot be effective absent a written declaration to that effect, has gone beyond the peripheria of the United States Constitution.

Policy considerations support a rule of law which allows a finding of implied waiver of jury trial from the totality of the circumstances, balancing the interests of society and of the defendant.

The decision of the Ohio Supreme Court in this case substantially affects the rights of the people of Ohio under the United States Constitution. Justice Holmes in the concurring opinion of the Ohio Supreme Court stated as follows:

> "Here, the facts glaringly show that there was an obvious courtroom sandbagging perpetrated upon the trial judge by the defendant and his trial counsel."

If the decision of the Ohio Supreme Court is allowed to stand, all defendants who waive the right to jury trial by oral pronouncement and by the totality of the facts and

circumstances will win new trials if they are convicted by simply refusing to execute a waiver in writing. Such a result is an insult to the integrity of the judicial system and a travesty of justice.

The people of the State of Ohio pray for relief from the decision of the Supreme Court of Ohio which has gone beyond the requirements of federal constitutional law.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

Does Federal Law Prohibit A State Trial Court From Finding An Implied Waiver Of Jury Trial From The Totality Of The Surrounding Facts And Circumstances Of The Case, Under The Fifth And Sixth Amendment, As Applicable To The States Through The Fourteenth Amendment, Thereby Creating An Inflexible Rule Which Goes Beyond The Mandates Of The United States Constitution Where The Defendant Is A Man Of Above Intelligence And Represented By Employed Counsel, And The Latter Informs The Trial Court That The Jury Was Waived And When Asked By The Trial Judge If The Defendant Was Ready And Did Not Mention A Jury Trial, Proceeded To Trial Before The Court, And Where The Defendant And His Counsel Had No Complaint About Proceeding Without A Jury After Conviction And Sentencing?

The State of Ohio respectfully submits that the judgment of the Ohio Supreme Court cannot stand, since a state court can neither add to nor subtract from the man-

dates of the United States Constitution. *Oregon* v. *Hass,* 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975).

There is no allegation of an affirmative waiver in this case. The question is not one of form but whether the defendant in fact knowingly and voluntarily waived his right to a jury trial. The United States Supreme Court held in *North Carolina* v. *Butler,* 60 L.Ed. 286 (1979) that a court may find an intelligent and understanding waiver of a jury trial where the defendant did not expressly state as much. In *Butler,* this Court made it clear that the procedural safeguards of written waivers were not themselves rights protected by the constitution but were only prophlylactic guidelines. The per se rule that the Ohio Supreme Court has found does not speak to these proscriptions and in fact equivocally rejects the pronouncement of the United States Supreme Court in *Butler.* Precisely, there is no federal constitutional prerequisite mandating that the only effective waiver is one in writing. *United States* v. *Ricks,* 475 F.2nd 1326 (1973); *Johnson* v. *Zerbst,* 304 U.S. 458. The decision of the Ohio Supreme Court is repugnant to federal organic law and eviscerates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

In the case of *Horne* v. *U.S.,* 264 F. 2d 40 (1959), the Appellant there attempted to overturn a conviction for armed bank robbery on the grounds that he had not effectively waived his right to trial by jury of twelve in writing as required by Federal Rule 23 (B). The federal circuit court held that this action by trial counsel, taken in open court with no protests from the Appellant having been voiced, was the act of the Appellant. The Court went on to hold that a waiver had been effectuated and the Appellant was not entitled to have the sentence vacated.

In the case at bar, it is clear that trial counsel was well

aware of the jury trial requirements and the attorney who filed the jury demand was seated during trial at counsel table with the trial attorney and the defendant. The instant defendant was a well educated professional person, who testified in his own behalf in an intelligent manner. After the trial court entered a finding of guilty, both defendant and his attorneys were given the opportunity to address the court and did so.

Throughout the proceedings, as reflected in the transcript, there was not one word to suggest that either defendant or his attorneys objected in any way to what has to be considered as obvious; i.e., a trial to the court without intervention of a jury. It was only after the trial court sentenced the defendant that there was any indication of dissatisfaction with the proceedings.

Clearly, the defendant's participation in trial, represented by two experienced attorneys, rendering no objection to the proceedings without a jury, constitutes by the "totality of facts and circumstances" an effective, knowing and intelligent waiver of the right to a jury trial.

Most recently, the United States Supreme Court considered an identical issue of waiver in *North Carolina* v. *Butler,* 60 L. Ed. 2d 286 (1979). Specifically, the Supreme Court of North Carolina, like the Ohio Supreme Court in the instant cause, overstepped the peripheria of the United States Constitution in adopting a per se inflexible rule that no implicit waiver of a constitutional right can ever suffice.

The judgment of the Ohio Supreme Court cannot stand as it adds to the mandates of the United States Constitution and is repugnant to the Fifth, Sixth and Fourteenth Amendments of the Constitution.

CONCLUSION

The People of the State of Ohio, Petitioner, implore upon this United States Supreme Court the necessity to rectify the transgression imposed upon them by the Supreme Court of Ohio, and respectfully request that the decision rendered by the Ohio Supreme Court be reversed and judgment stand in light of *North Carolina* v. *Butler*. To hold otherwise would permit litigants to take advantage of a procedural device, the inflexible per se rule adopted by the Ohio Supreme Court with the assistance of counsel aiding and abetting, to commit a travesty of justice.

Accordingly, the People of the State of Ohio pray for the assistance of the United States Supreme Court in restoring the constitutional interpretation which comports with society's interest in security and judicial integrity. Balancing these interests leads to the conclusion that this Court should hold that a waiver of the right to trial by jury can be implied from the totality of circumstances. Defendant's conviction is free from any constitutional infirmity requiring a new trial, and accordingly, no new trial should take place.

Respectfully submitted,

DOLORES JECHURA
HILDEBRANDT
Senior Assistant City Prosecutor

Counsel for State of Ohio
Petitioner

APPENDIX A

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

ELBERT TATE,

Appellant.

Where a defendant in a petty offense case has a right to trial by jury and pleads not guilty and demands a jury trial in the manner provided by Crim. R. 23 (A), it must appear of record that such defendant waived this right in writing in the manner provided by R. C. 2945.05, in order for the trial court to have jurisdiction to try the defendant without a jury.

(No. 79-3—Decided July 11, 1979.)

APPEAL from the Court of Appeals for Hamilton County.

As a result of alleged activities occurring during a teachers' strike, appellant, Elbert Tate was, on April 21, 1977, charged with complicity in criminal damaging, a violation of R. C. 2923.03. This offense is a second degree misdemeanor carrying a maximum penalty of 90 days in jail and, or, a $750 fine. Appellant plead not guilty to the charge and retained an attorney, Donald J. Mooney, Jr., who timely filed a written demand for a jury trial on appellant's behalf, pursuant to Crim. R. 23 (A).

A trial to the court was held on May 24, 1977, in Hamilton County Municipal Court. At that time, appellant was represented by Leslie I. Gaines, though attorney Mooney was also present as an observer. A jury was never impaneled, and no objection to this fact was ever raised by the defense. However, the record discloses neither a written nor an oral waiver of the jury trial by appellant, prior to or during the trial.[1]

At the conclusion of the evidence, the trial judge found appellant guilty as charged and sentenced him to 90 days imprisonment, with 60 days thereof being suspended. The Court of Appeals affirmed the trial court's judgment.

This cause is now before this court pursuant to allowance of a motion for leave to appeal.

Mr. Thomas A. Luebbers, city solicitor, *Mr. Paul J. Gorman* and *Mr. Terrence R. Cosgrove,* for appellee.

Messrs. Paxton & Seasongood and *Mr. Donald J. Mooney,* for appellant.

SWEENEY, J. The issue presented by this appeal is whether appellant knowingly, intelligently and voluntarily waived his right to trial by jury.

The accused's right to be tried by a jury is secured in this state by Article I, Section 10 of the Ohio Constitution[2]

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[1] Affidavits were presented to the Court of Appeals indicating that attorney Gaines orally waived appellant's right to a jury trial during a discussion with the judge. The Court of Appeals found that these affidavits "do not meet the definition of the record on appeal as set out in App. R. 9, and accordingly cannot be considered." While we concur in this ruling, it should become apparent that the presence of these affidavits would change neither the reasoning of this opinion, nor our final judgment.

[2] This constitutional provision states, in relevant part:

"Except in • • • cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary • • •. In any trial, in any court, the party accused shall be allowed • • • a speedy public trial by an impartial jury • • •."

and R. C. 2945.17.[3] Since the potential, as well as the actual, penalty imposed for this misdemeanor violation was imprisonment, appellant Tate possesed this right. However, "[t]he guarantee of a jury trial in criminal cases contained in the state and federal Constitutions is not an absolute and unrestricted right in Ohio with respect to misdemeanors, and a statute, ordinance, or authorized rule of court may validly condition the right to a jury trial in such a case on a written demand therefor * * *." *Mentor* v. *Giordano* (1967), 9 Ohio St. 2d 140, paragraph one of the syllabus. Such a rule is "not in any wise violative of the constitutional right to trial by jury." *Hoffman* v. *State* (1918), 98 Ohio St. 137, paragraph one of the syllabus.

Crim R. 23 (A) is such a rule. It provides, in pertinent part:

"In serious offense cases the defendant * * * may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. * * * In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing * * *. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto."

Since the crime charged was a petty offense (see Crim. R. 2), appellant was required to, and did, timely file a written demand for a jury trial. However, the state contends that appellant subsequently waived this right he had previously preserved, by silently acquiescing to a trial to the court.

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[3] This statute provides:

"At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

In affirming appellant's conviction, the Court of Appeals accepted appellee's contention that there was an implicit waiver. They stressed appellant's intelligence, the awareness of both trial counsel and the observing attorney of the procedural rules, and the complete lack of any objection to the failure to impanel a jury as evidence of this waiver.

While the circumstances of this cause could lead one to surmise that appellant was aware of the situation and possibly took advantage of it, we cannot accept the proposition that there was a waiver of this right by silence. To do so would not only conflict with years of constitutional precedent, it could well require this court to review the circumstances of all such similar cases to determine whether the conduct and education of the accused and the adequacy of his counsel would support such an implicit waiver in each instance. As was stated in *Simmons* v. *State* (1906), 75 Ohio St. 346, at paragraph two of the syllabus, "[s]uch waiver must clearly and affirmatively appear upon the record, and it can not be assumed or implied by a reviewing court from the silence of the accused * * *." Furthermore, '[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or provilege deemed so valuable as to be secured by the Constitution.' *Id.*, at page 352.

The problem of what constitutes an effective waiver of the right to a jury trial arises because, while Crim. R. 23 (A) requires, in serious offense cases, that the waiver be in writing, it does not prescribe how the right is to be waived in petty offense cases, once it has been demanded. Fortunately, we can look to R.C. 2945.05 for assistance in remedying this omission in the rule. That statute provides, in part:

"*In all criminal cases* pending in courts of record in

this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, *shall be in writing*, signed by the defendant, and filed in said cause and made a part of the record thereof." (Emphasis added.)

Under the authority of Section 5 (B), Article IV of the Ohio Constitution,[4] the Criminal Rules supersede the analogous statutes to the extent of any conflict. However, since there is no conflict between Crim. R. 23 (A) and R. C. 2945.05 in this specific situation, the statute remains effective, as prescribing the mandatory procedure for waiving the right to a jury trial in a petty offense case, once it has been demanded. The Court of Appeals in *Lima* v. *Rambo* (1960), 113 Ohio App. 158, 162, reached essentially the same conclusion, holding that, "[i]t appearing of record that the defendant had pleaded not guilty and a jury trial had been demanded * * *, in a case in which the defendant had a right to trial by jury, it must also appear of record that the defendant had waived such right in the manner provided by Section 2945.05, Revised Code, before Municipal Court had jurisdiction to proceed to try the defendant without a jury."

Since R. C. 2945.05 was not complied with in this instance, appellant was denied his constitutional right to trial by jury.[5] This is prejudicial error which requires us to reverse the conviction of the trial court and the judgment

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[4] This section provides, in pertinent part, that "* * * [a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

[5] This holding is not inconsistent with paragraph two of the syllabus in *State* v. *Harris* (1976), 48 Ohio St. 2d 351, wherein we found that a written waiver executed at the conclusion of the trial satisfied the requirements of Crim. R. 23(A). Presumably this procedure would also comply with R. C. 2945.05.

of the Court of Appeals affirming that conviction, and remand the cause to the Hamilton County Municipal Court for a new trial.

Judgment reversed and cause remanded.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, LOCHER and HOLMES, JJ., concur.

HOLMES, J., concurring. I concur in the decision in this case, but feel compelled to make a few observations concerning the law that this court was compelled to apply even in light of the facts presented.

Justice Sweeney is correct in his conclusions that R. C. 2945.05 was not superseded by Crim. R. 23 (A) even though so stated within the editorial comment of Page's Ohio Revised Code. The substantive right of trial by jury as granted in R. C. 2945.05 is not necessarily in conflict with Crim. R. 23 (A).

However, under the facts as presented within this case, and other similar circumstances where a definite waiver is shown by the knowing acts of the party, the law should reasonably allow a waiver to be effected in petty criminal cases. Here, the facts glaringly show that there was an obvious courtroom sandbagging perpetrated upon the trial judge by the defendant and his trial counsel.

Here, the record shows that the defendant is a man of above normal intelligence. He was represented by employed counsel, and the latter, when asked by the trial judge if the defendant was ready to proceed to trial, stated that he was ready and did not mention to the judge that he desired a jury trial. The trial proceeded and the defendant testified. Upon being found guilty of the offense charged, the defendant and his counsel had no comment

to make to the court and, again, no mention of, or complaint about, proceeding without a jury.

It is my belief that, in order to avoid this type of situation in the future, prosecutors should make a more thorough review of the record to determine the presence of a request for a jury. An even more appropriate permanent approach would be for the General Assembly to amend R. C. 2945.05 so that a waiver need only be in writing by one charged with a serious offense.

P. BROWN, J., concurs in the foregoing concurring opinion.

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-77406

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ELBERT TATE,

Defendant-Appellant.

DECISION

(Filed November 22, 1978)

Messrs. Thomas A. Luebbers, Paul J. Gorman and Terrance Cosgrove, Room 200-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Donald J. Mooney, Jr., 1700 Central Trust Tower, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers

from the Hamilton County Municipal Court, the transcript of the proceedings, the briefs and the arguments of counsel.

As a result of an incident which occurred during the course of a teachers strike at Winton Place Elementary School, the defendant-appellant, who was one of the teachers on strike, was charged with complicity in criminal damaging on April 21, 1977. Thereafter, on May 6, 1977, on arraignment, Mr. Tate pled not guilty and was assigned a trial date. Prior to the date of trial a jury demand in writing as provided for by Civ. R. 23 was filed on behalf of appellant by Donald P. Mooney, Jr., attorney for the appellant. Sometime thereafter, and before trial, a second attorney, Mr. Leslie I. Gaines, was employed to represent the appellant as trial counsel. Appellee's briefs argue that on May 17 Mr. Gaines informed the trial judge that the case would be tried to the court without a jury. This information comes by reason of this Court's granting a Motion for Diminution of the Record. The cause was remanded thereafter to the trial court and three affidavits, including the affidavit of the trial judge, were transmitted with the record to this Court.[1] The majority of this panel is of the opinion that these affidavits, filed to supplement the record, do not meet the definition of the record on appeal as set out in App. R. 9, and accordingly cannot be considered.

On May 24, 1977, the case was called in the trial court at 1:00 p.m. on schedule and the appellant appeared along with Messrs. Gaines and Mooney. The transcript of the proceedings in the trial court indicates the following:

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[1] The trial judge, a clerk in the assignment commissioner's office and the assistant prosecutor handling the case in the trial court, all prepared and signed the affidavits indicating that Mr. Gaines had orally told the trial court in chambers that the jury demand would be withdrawn and the case would be tried to the court and that, as a consequence, the case was re-scheduled as a bench trial.

THE COURT: All right, now, are we ready for the Tate case?

MR. GAINES: We're ready, Your Honor.

MR. COSGROVE: Plea is going to be not guilty, Your Honor.

There followed a preliminary matter, a Motion to Dismiss, which was argued and overruled by the trial court. The record then indicates that the case was recessed for some period of time due to other court business to be disposed of, and then we find in the transcript:

THE COURT: All right, are we ready to go to trial on this case, finally?

MR. COSGROVE: We're ready, Your Honor.

MR. GAINES: Defense is ready, Your Honor.

Thereafter witnesses were sworn, counsel for the parties joined in a motion for a separation of witnesses, and the first witness was called. At the conclusion of the presentation of the evidence, the defendant-appellant, having testified in his own behalf, the trial court heard the arguments of counsel. Appellant's counsel began his summation by addressing the court in this fashion:

MR. GAINES: If it please the Court and the prosecutor, I notice the Court has attentively heard the evidence and the testimony but I would like to begin by stating, of course, we know the yardstick to be used in any criminal case; it's proof beyond a reasonable doubt. . . .

At the conclusion of argument the Court addressed the appellant and counsel as follows:

THE COURT: Mr. Tate, Mr. Gaines, you want to come up here, please.

> Mr. Tate, I have sat through this trial and carefully tried — carefully tried to listen to the testimony on both sides and I have taken notes of the testimony. I have observed the witnesses on the stand and without beating around the bush I tell you that based on all the available evidence on the case I find you guilty as charged.
> Is there anything you care to say before the Court passes sentence?
>
> MR. GAINES: I think the Court has heard the testimony, Your Honor. I think you have heard Mr. Tate's background, we have nothing further to say by way of mitigation.
>
> THE COURT: All right. Well, you want to say anything, Mr. Tate?
> MR. TATE: No, sir.

The court thereafter pronounced sentence. Then counsel for appellant said:

> MR. GAINES: Mr. Tate has informed me he wishes to appeal the Court's decision. May we ask a stay of the execution and allow Mr. Tate to remain on the same bond pending appeal?

The trial court granted the appellant's request and the appeal was timely perfected to this Court.

Appellant assigns as his single claimed error that:

> The trial court erred as a matter of law by proceeding to try the defendant without a jury, when the defendant had filed a written demand for a jury and had not effectively waived his right to a jury trial.

We begin by acknowledging the well-known principle that in Ohio a defendant has a right to a jury trial in any case where the charge lodged may subject the defendant, if found to be guilty, to a sentence of imprisonment. Such

was the case here. The trial court sentenced the appellant to a term of ninety days of confinement and suspended sixty days of that sentence. The Ohio Rules of Criminal Procedure provide that in petty offense cases where there is a right to a jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial. Crim. R. 23 (A). Crim. R. 2 defines "petty offense" as a misdemeanor other than a serious offense. Crim. R. 23 also provides that in serious offense cases the defendant, before commencement of the trial, may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. The rule is silent as to the means by which a jury trial in a petty offense case may be waived subsequent to the demand for jury trial having been made in writing in conformity with the rule. As a consequence, we must add flesh to the skeletal jury trial requirement, or waiver thereof, as established by the Constitution and the Rules of Criminal Procedure. There is apparently no dispute between the parties that a defendant may waive his right to trial by jury, the determinative question always being, was the waiver intelligently and voluntarily made? See *Patton* v. *United States* (1930), 281 U.S. 276, 50 Supreme Court 253. The second prong of the question, however, is, what is required of the defendant in order to effectuate such a waiver? The accepted standard for waiver of a constitutional right is an intentional relinquishment of that right. *Johnson* v. *Zerbst* (1938), 304 U.S. 458. There is, however, no constitutional requirement of which we are aware that requires that the waiver be in writing. *United States* v. *Ricks* (1973), 475 F.2d 1326. In the case of *State* v. *Harris* (1976), 48 Ohio St. 2d 351, 359 N.E.2d 67; an aggravated murder trial, the defendant was tried to

a three judge panel and it was not discovered until after the verdict had been rendered that the defendant had not executed a written waiver. After verdict, the defndant signd such a waiver in open court. On appeal, he contended that his due process rights were violated by the trial court in failing to determine whether his waiver of a jury trial and election of a three judge panel was knowingly, intelligently and voluntarily made. The court overruled this assignment of error and observed:

> "To reverse this conviction on such a narrow, hypertechnical point would not be justified by reason or logic.

In the case of *Horne* v. *United States* (1959), 264 F.2d 40 the appellant there attempted to overturn a conviction for armed bank robbery on the grounds that he had not effectively waived his right to a trial by jury of twelve in writing as required by Federal Rule 23 (B). In that case one of the twelve jurors became incapacitated during trial and when he was unable to proceed, the trial court, with the agreement of trial counsel, proceeded to the conclusion of the trial with but eleven jurors. The federal circuit court held that this action by trial counsel, taken in open court with no protests from the appellant having been voiced, was the act of the appellant. The Court went on to hold that a waiver had been effectuated and the appellant was not entitled to have the sentence vacated. For a state court ruling on almost identical circumstances, see *State* v. *Ciniglio* (1950), 57 N.J. super. 399. In the case of *Coats* v. *Lawrence* (1942), 46 F. Supp. 414, affirmed, 131 F.2d 110 the Court took into consideration the appellant's literacy and experience in considering whether or not an effective waiver had been accomplished. It has been held by the Supreme Court of Ohio that agreements, waivers and stipulations made by defense counsel in the

presence of the defendant during the course of a criminal trial, after the termination of the trial, are binding and enforceable upon the defendant. See *State* v. *Robbins* (1964), 176 Ohio St. 362, 199 N.E.2d 742 and *Brookhart* v. *Hoskins* (1965), 2 Ohio St. 2d 36, 205 N.E.2d 911.

In the case at bar it is clear that trial counsel was well aware of the jury trial requirements as prescribed by the Criminal Rules of Procedure and, interestingly, counsel who filed the jury demand on behalf of the appellant was in court and apparently participated in the defense. We think it also important to note that the appellant was an educated professional person, *i.e.*, a teacher in the Cincinnati School System. He took the witness stand and testified in his own behalf in an intelligent manner. After the trial court had made a finding of guilty, both the appellant and his counsel were given an opportunity to address the court and did so. Throughout the proceedings, as reflected in the transcript, there is not one word to suggest that either appellant or his attorney objected in any way to what has to be considered as painfully obvious, *i.e.*, a trial to the court without intervention of a jury. It was only after the trial court sentenced the appellant that there was any indication that appellant was dissatisfied with the proceedings. We also observe that appellant here does not complain that he did not receive a fair trial but only that he was denied a jury trial after having complied with the Criminal Rule in demanding such a trial. The only issue then, before us, is whether, under the circumstances of this case, the appellant effectively waived his right to a trial by jury. We note simply in passing that in other jurisdictions where a similar question has been presented, there is a divergence of opinion as to what constitutes an effective waiver. In our opinion, in this case appellant's participation in trial, represented by two experienced at-

torneys, rendering no objection to the proceeding without a jury, is by implication an effective, knowing and intelligent waiver of the right to a jury trial. To hold otherwise would permit a litigant to take advantage of a procedural device, so that if he was dissatisfied with the outcome of the trial, he could belatedly object to a deficiency in the proceedings which he, with the assistance of counsel, aided and abetted. Such a result would be a travesty of justice. The assignment of error is without merit. We affirm the decision of the trial court.

PALMER, P. J., and CASTLE, JJ.

KEEFE, J., CONCURS.

KEEFE, J., *CONCURRING*:

I assuredly agree with the judgment of affirmance in this matter. However, I consider that I am supported in this decision by a fundament not articulated in the majority opinion. The State of Ohio moved "for diminution of the record." We found said motion well taken, granted it, and returned the record to the trial court for "diminution." Resultantly, the record was augmented by the certification to our Court of three affidavits: one from the Municipal Court assignment commissioner, one from the assistant prosecuting attorney of the Municipal Court and one from Judge Ralph Winkler of the Municipal Court – the trial judge. I agree that the statements of the assignment commissioner and the prosecuting attorney constitute no proper parts of the appellate record in this case. However, Judge Winkler's affidavit amounts to a supplemental record duly certified and transmitted. The judge's sworn statement – arguably equivalent to a narrative statement – asserts that appellant's then lawyer withdrew the jury demand earlier submitted and Judge Winkler proceeded to

notify the assignment commissioner "that there would be a bench trial instead of a jury trial." In other words, the present appellate record convincingly demonstrates that counsel for appellant Tate made a jury demand and subsequently – and effectively – withdrew it.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

OHIO RULES OF CRIMINAL PROCEDURE
(effective July 1, 1973)

Rule 23

TRIAL BY JURY OR BY THE COURT

(A) Trial by jury. In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

(B) Number of jurors.
In felony cases juries shall consist of twelve.
In misdemeanor cases juries shall consist of eight.

(C) Trial without a jury. In a case tried without a jury the court shall make a general finding.

OHIO REVISED CODE SECTION 2945.05

Defendant may waive jury trial. (GC § 13442-4)

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I ....., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

HISTORY: GC § 13442-4; 113 v 123 (179), ch.21, § 4. Eff 10-1-53.

APPENDIX D

ARTICLE IV Section 5 (B) Constitution of the State of Ohio provides:

> "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.
>
> . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

APPENDIX E

AFFIDAVIT

HAMILTON COUNTY MUNICIPAL COURT

Elbert Tate
2525 Victory Parkway, Apt. 918
Cincinnati, Ohio

Before me personally came Judge Ralph Winkler who, being duly sworn according to law, states that on or about the 17th day of May, 1977 at Cincinnati, Ohio, (name of accused), did** have a conversation with Mr. Leslie Gaines, Attorney for Elbert Tate (Case #77 CRB 7105), at which time he informed me that the jury for Mr. Tate's case was to be waived. I then called the Assignment Commissioner's Office and spoke to Mr. Kleinhaus. I requested that Mr. Tate's case should be changed from a pre-trial on May 23, 1977, to a trial setting. I also informed Mr. Kleinhaus that Mr. Gaines had stated that there would be a bench trial, instead of a jury trial.

On May 24, 1977, both parties appeared for trial at 1:00 p.m. When I asked if the parties were ready for the case, Mr. Gaines indicated that the defense was ready. A trial to the bench was then held; it lasted well over two hours. There was a finding of guilt, and a sentence was imposed. It was only after the sentence had been imposed that Mr. Gaines stated to me that "I've got my back to the wall", and then brought to my attention the fact that there was no written jury waiver.

/s/ RALPH WINKLER, Judge
222 E. Central Parkway
Cincinnati, Ohio

[Duly notarized on January 11, 1978]

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-574

STATE OF OHIO,

Petitioner,

vs.

ELBERT TATE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Rule 19 (1) (a), Rules of the Supreme Court of the United States, generally limits the grant of a Writ of Certiorari to those cases

> "Where a state court has decided *a federal question of substance* not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (emphasis added)

It is apparent from the State of Ohio's Petition, as well as from the Opinion of the Ohio Supreme Court, *State of Ohio* v. *Tate,* 59 Ohio St. 2d (July 11, 1979), that this matter neither presents a "federal question of substance" nor a decision "not in accord with applicable decisions of this court."

In fact, the order of Ohio Supreme Court reversing Mr. Tate's conviction simply presents questions arising under

the Ohio Constitution, the Ohio Revised Code and Ohio's criminal rules.

As stated in detail in the Ohio Supreme Court's Opinion, Mr. Tate's trial counsel agreed to waive the right to trial by jury in an off-the-record pretrial conference that was not attended by the Defendant. Mr. Tate did not waive his right personally, either in writing, or by a statement made in open court. In Ohio, the right to trial by jury is guaranteed by the Ohio Constitution in all cases where a conviction might result in imprisonment. Article I, Section 10, Ohio Constitution. That right is further guaranteed by Ohio Revised Code Section 2945.17. (Petition, 2a-3a). The Ohio Revised Code, at Section 2945.05 provides a specific means of waiving a trial by jury:

> "In all criminal cases pending in courts of record in this State, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by defendant *shall be in writing,* signed by the defendant, and filed in said cause and made a part of the record thereof." (emphasis added).

On appeal Mr. Tate argued that his Ohio constitutional and statutory rights were violated when he was brought to trial without a jury, despite the absence of a written waiver. While certain constitutional arguments were made before the Ohio Supreme Court, the court relied exclusively on Ohio Revised Code Section 2945.17, and its specific requirement of a written waiver.

That fact is clearly shown in the Opinion of the majority, authored by Justice Sweeney:

> "Since R.C. 2945.05 was not complied with in this instance, appellant was denied his Constitutional right to trial by jury." (Petition, 5a)

In a concurring opinion, Justice Holmes suggested that a different result would occur only through amendment of that statute by the Ohio General Assembly:

> "An even more appropriate permanent approach would be for the General Assembly to amend R.C. 2945.05 so that a waiver need only be in writing by one charged with a serious offense." (Petition 7a)

The issues presented by this case arise exclusively from the Ohio Constitution and the Ohio Revised Code, the interpretation of which is best left to the Ohio Supreme Court. The authority primarily relied upon by the State, *North Carolina* v. *Butler,* 60 L. Ed. 2d 286 (1979) involves the right to counsel, rather than the right to trial by jury, and does not involve a state statute specifically requiring a written waiver of a constitutional right. Since no "federal question" is presented the Petition for Writ of Certiorari is not well taken and should be denied by this Court.

Respectfully submitted,

DONALD J. MOONEY, JR.
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OF COUNSEL:

PAXTON & SEASONGOOD
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(513) 352-6700

CERTIFICATE OF SERVICE

A copy of the foregoing Response to Petition for Writ of Certiorari has been served by depositing three copies thereof in the United States mail, first class, postage prepaid, in an envelope addressed to Ms. Dolores J. Hildebrandt, Room 200-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202.

.....

Donald J. Mooney, Jr.